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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

VS.

CITY OF TIBURON,
Appellee.

Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF JURISDICTIONAL STATEMENT

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

ELLEENE A. KIRKLAND
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants Donald and Bonnie Agins. Consent to the filing of the brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Agins appeal from the decision of the California Supreme Court which holds that they are not entitled to proceed to trial on the issue of whether compensation is required for a total loss of use of their ridgeland property by operation of the City of Tiburon's open space zoning

ordinance. The decision appealed from holds that California property owners faced with oppressive and invalid land use regulation may not seek money damages by way of the inverse condemnation remedy, but may only seek invalidation of the offending regulation. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276-77 (1979).

Pacific Legal Foundation believes that this decision portends grave consequences to the general public and raises substantial federal questions in that the California court's decision would carve out a significant exception from the protections of the Federal Due Process Clause.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, its members, supporters, and contributors are concerned that the decision of the California Supreme Court in this case poses a serious threat to the integrity of the individual right of property. Amicus takes the position that a California owner whose property becomes subject to unconstitutional regulation cannot effectively protect his rights if he is limited to the remedy prescribed by the California Supreme Court. PLF contends that where a zoning

ordinance effects a "taking" of property within the meaning of the just compensation clause of the Fifth Amendment, invalidation of the ordinance does not vindicate or protect the rights of the property owner. A full measure of protection is afforded only where the inverse condemnation remedy is available. Invalidation frequently has the effect of perpetuating the injury, while damages in inverse condemnation fulfill the guarantee of just compensation. It is the position of amicus that the burden of promoting the public good should not be borne, even if only for an interim period, by a single landowner. To impose such burden would defeat the distributional policy of the Just Compensation Clause.

Amicus does not herein argue the question of what degree of regulation effects an unconstitutional taking. The concern is with preservation of a property right once infringement of the right has been determined in court. A means for real protection of property rights must be available. The right of property must be guarded as is every other right within the penumbra afforded constitutional protection. *See Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Should the decision of the California Supreme Court be allowed to stand, the rights guaranteed to California citizens by the Federal Constitution will be denied.

Amicus PLF is also concerned with the public policy issues raised by the California Supreme Court's decision. The decision if allowed to stand will have profound effects on the price and availability of adequate housing.

Government regulation in the 1970's has been responsible for a dramatic increase in the price of housing. Numerous studies have documented the inflationary impact of housing regulation.[1] They point out that government policy and regulation have been significant factors responsible not only for the creation of a housing scarcity, which has forced prices to escalate, but also for pronounced reduction in the number of people who can buy new homes.[2]

The California Legislature has recognized the problems incident to the provision of adequate and affordable housing and to that end has mandated that California communities "make adequate provision for the housing needs of all economic segments of the community." Cal. Gov't Code § 65302(c). The *Agins* decision thwarts this policy and the interests of those in search of affordable housing by further increasing the risks associated with the production of housing. Where the provision of housing becomes a high risk undertaking, due to the probability, for example, of delay, lengthy litigation to overturn invalid regulations or arbitrary and capricious governmental action, that risk factor

[1]*See, e.g.*, Urban Land Institute and Gruen Gruen & Associates, *Effects of Regulation on Housing Costs: Two Case Studies*, Washington; Urban Land Institute (1977); and Seidel, S., *Government Regulations and Housing Costs*, Rutgers University Center for Urban Policy Research (1977).

[2]Urban Land Institute, *supra* note 1, at page 1.

In June, 1979, the median price of an *existing* home in California was a record high of $82,094. Average new home prices in the San Francisco area alone in June, 1979, increased to $106,000. Source: Telephone interview, Mr. Joel Singer, California Association of Realtors, Los Angeles, California, July 31, 1979.

The Urban Land Institute and Gruen Gruen & Associates' study points out that "stringent development constraints have resulted in heavy competition for scarce housing and price increases of 25-100 percent per year." Urban Land Institute, *supra* note 1.

is ultimately passed on to the consumer. Economist Paul Samuelson expresses the point as follows:

> "If people generally act like risk averters . . . they will prefer smaller steady incomes to erratic incomes even when those average out to a higher figure. Therefore, economic activities that involve much uncertainty and risk . . . will be forced by comparative entry and exit of risk takers to pay, over the long run, a positive profit premium to compensate for aversion to risk. The yield on capital invested in such industries will involve, in addition to pure interest corresponding to safe investments, an extra element corresponding to positive profit."[3]

The added risk factor discourages entry into the market, reducing competition, and results in less housing at higher prices. The *Agins* decision, creating uncertainty and exacerbating market disequilibrium, adds significantly to a critical housing problem.

The foregoing are the interests and concerns of amicus Pacific Legal Foundation.

OPINION BELOW

The opinion of the California Supreme Court is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979). A copy of the opinion is attached as Appendix A to the Jurisdictional Statement.

[3]Samuelson, *Economics: An Introductory Analysis*, 604 (6th ed. 1964).

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the facts of the case as it appears in the Jurisdictional Statement.

ARGUMENT

I

ELIMINATION OF THE FEDERALLY GUARANTEED MONEY DAMAGES REMEDY BY THE STATE COURT FURTHER ERODES INDIVIDUAL RIGHTS IN PROPERTY NECESSITATING REVIEW BY THIS COURT

For nearly two centuries, American political scientists and legal scholars have pointed to protection of individual property rights as the fundamental motivation for adoption of the Federal Constitution. In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth century jurists broadly construed the Contract Clause, U.S. Const., art. I, § 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas,* 123 U.S. 623 (1887). This Court has unambiguously indicated that the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation operates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead,* 369 U.S. 590

(1962); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). As stated by Justice Holmes:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.,* 260 U.S. at 415.

Despite the safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property. Through a multitude of regulatory programs, individual rights in property have been compromised and sometimes totally disregarded. Without question, individual rights in property are held subject to society's right to be assured of public health, safety, and welfare. With the growth of cities and concomitant increase in urban density, public versus private conflicts were inevitable. The notion of which subjects are appropriate for regulation has necessarily expanded. As this Court stated in *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387 (1926), "In a changing world it is impossible that it should be otherwise."

Although an owner's freedom to use, enjoy, and derive profit from property has been severely diminished, the individual whose property interests have been subject to regulation which goes "too far" has not been without an effective remedy. Federal and state courts have recognized that an action in inverse condemnation will lie to challenge unjust legislation. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1979); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ..... U.S. ....., 59 L. Ed. 2d 401 (1979); *Gordon v. City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto,* 372 F. Supp.

647 (N.D. Cal. 1974); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976).

Prior to the California Supreme Court's decision in this case, inverse condemnation was also available to relieve California property owners of the burdens of unconstitutional restrictions.[4] Now, however, the California court would deprive California property owners of this remedy, the continued availability of which is fundamental to the protection of individual rights in property.

By its decision in this case, the court limits the use of inverse condemnation to those cases in which government "takes" private property by physical invasion. To draw this distinction between physical taking of property and denial of substantially all use thereof is to reject universally accepted notions of the concept of property. It is ironic that the *Agins* majority cites this Court's clear definition of "property" which appears in *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Agins v. City of Tiburon*, 24 Cal. 3d at 273. As it is used in the Just Compensation Clause of the Fifth Amendment, "property" denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.

[4]See *San Diego Gas & Electric Co. v. City of San Diego*, 81 Cal. App. 3d 844 (1978), hearing granted July 13, 1978, cause retransferred to Court of Appeal, Fourth District, June 14, 1979, for reconsideration in light of *Agins; Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613 (1976). Both cited cases expressly recognized inverse condemnation as a remedy for regulation which effects an unconstitutional taking. *Eldridge* was specifically disapproved in *Agins*. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 273 (1979).

. . . In other words, it deals with . . . the individuals' 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple,' or it may be a [lesser interest]. . . . *The constitutional provision is addressed to every sort of interest the citizen may possess." United States v. General Motors Corp.*, 323 U.S. at 377-78 (emphasis added).

Amicus believes that a citizen should be entitled to money damages when the government appropriates his interest in the *use* of his property, even if only for a temporary period, as well as when it takes his interest in *physical possession*. Right of user is one of the most important and fundamental of the bundle of rights associated with the ownership of property.

> "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." *2 Nichols on Eminent Domain* (3d rev. ed. 1975), Section 6.13 at 6-65. *Accord, United States v. General Motors Corp.*, 323 U.S. at 378.

The distinction drawn by the California court between physical appropriation and an unlawful appropriation of a right of use as regards the right to money damages is one that has neither been accepted by this Court, nor should be. To do so is to drastically modify fundamental concepts of property.

II

THE REMEDY OF INVALIDATION IS WHOLLY INADEQUATE WHEN CONSIDERED IN THE LIGHT OF PRINCIPLES OF EQUITY AND FAIRNESS

The California Supreme Court has concluded that an aggrieved landowner's sole remedy is to seek invalidation of a government regulation when a public agency has adopted a regulation which substantially limits the use of his property. *Agins v. City of Tiburon,* 24 Cal. 3d at 269-70. Amicus strongly urges that there is no real relief provided by this remedy. It is illusory at best and in practice actually perpetuates the injury imposed by the invalidated ordinance.

A. Invalidation Returns the Problem to the Entity Which Caused It in the First Place

It is fair to presume that the public objective which has been thwarted by invalidation of the ordinance enacted for its achievement remains desirable. Thus, it is likely that a public agency will pursue the objective through enactment of still another ordinance. The landowner who has won "relief" from the first ordinance will be burdened anew, albeit to a greater or lesser extent. There is the possibility that the agency may decide to exercise its power of eminent domain, but as discussed below, that is unlikely.

It is fundamental to our system of government that courts must defer as much as possible to legislative judgments concerning the manner in which public objectives will be achieved. But legislatures have a concomitant duty to avoid unfairness and to assess the constitutionality of their actions independent of what the courts may require.

Tribe, *American Constitutional Law,* Section 5.1 at 224 (1978). Unfortunately, lawmakers have frequently failed to fulfill these responsibilities in the area of land use regulation. The question of constitutionality is often given to the court without much consideration by the municipality. One commentator cites this as a major flaw in the invalidation remedy. Berger, M., *To Regulate or Not To Regulate—Is that the Question?,* 8 Loy. L.A.L. Rev. 253 (1975).

The *Agins* decreed remedy thus can have devastating practical effects on the property owner. While attempted resolution of the controversy bounces from court to city council and back again, the landowner is deprived of the fruitful use of his property. In this regard it should be noted that while the court may enjoin enforcement of the unconstitutional ordinance, the municipality may retaliate pursuant to California Government Code § 65858 and enact a moratorium pending reconsideration of the challenged ordinance for up to two years. This renders the invalidation remedy all the more ineffectual against arbitrary and capricious action.

Where, as here, the public objective is open space preservation, benefits accrue to the public during the course of this process. For this public *use* of his land, the landowner will receive *no* compensation if invalidation is his sole remedy.[5] This is patently violative of the constitutional guarantee of just compensation.

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[5]In *Eldridge v. City of Palo Alto,* 57 Cal. App. 3d 613 (1976), defendant city initiated severely restrictive measures on plaintiffs' land in 1969 with a development moratorium imposed pending completion of land use studies. The moratorium was extended twice while the city examined "the open-space problems." In 1972, the city announced the allocation of funds for purchase of plaintiffs' land. Shortly thereafter, their land was designated in the general (continued)

Thus, under the rule established in this case by the California Supreme Court, municipalities will have the freedom to attain their land use goals without the expenditure of public funds. In the era of Proposition 13, California's property tax limitation initiative, it is a certainty that local entities will fully exercise this new freedom. Although the public may cheaply acquire valuable benefits, it will do so only at great expense to individual property owners, sacrificing them to the public good.

B. Invalidation Does Not Achieve the Cost Distribution Objective of the Just Compensation Clause

The cost distribution objective of the Just Compensation Clause have long been upheld by this Court. This Court pointed out that:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

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plan for open space, while the city announced it was exploring how to best use the "open-space funds." It then authorized the purchase of some open space lands. Nevertheless, plaintiffs' land was zoned for open space. Opening Brief for Appellant, Donald F. Eldridge, at 32-40. Suit was instituted in 1973 seeking damages in inverse condemnation. Defendants' demurrer to the complaint was sustained by the trial court, but on appeal in 1976, that decision was reversed. The appellate court held that a cause of action in inverse condemnation had been stated. By then, seven years had passed during which plaintiffs' use of their property had been effectively frozen and the public enjoyed the benefits of open space at the expense of the landowners. The *Agins* court subsequently disapproved the *Eldridge* decision. *Agins,* 24 Cal. 3d at 273. All those property owners similarly situated to *Eldridge* are thus without any effective remedy to defend against even the most egregious of municipal conduct.

In the aftermath of litigation resulting in invalidation, it is safe to assume that the objectives embodied in the challenged ordinance will be achieved nonetheless. During that period and the preceding period of the ordinance's legal effectiveness, the impacted landowner is shouldering a burden which should be borne by the community as a whole. Even at the moment the court concludes that the landowner is paying more than his fair share and for that reason invalidates the ordinance, the inequity continues. Thus, invalidation does not provide the protection which is the basis for the just compensation guarantee. There is a total failure to distribute the loss.

This is to be contrasted with the remedy of inverse condemnation. Under that remedy, the burden of providing a public benefit or preserving a public resource would not be borne exclusively by the individual property owner. The cost of providing such benefits would be distributed equitably among the ultimate beneficiaries of the regulation, the entire community.

III

THE PUBLIC POLICY CONCERNS OF THE CALIFORNIA SUPREME COURT ARE INSUBSTANTIAL

The *Agins* majority indicated that in reaching its decision it was persuaded by "the need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy." *Agins v. City of Tiburon,* 24 Cal. 3d at 276-77. Amicus submits that these concerns, even if well founded, cannot be allowed to circumscribe federally guaranteed constitutional rights. The concerns, however, are

not well founded. Indeed, considerations of effective planning and economic impact counsel in favor of an opposite result.

A. The Availability of an Inverse Condemnation Remedy Will Not Adversely Affect the Planning Process

The California court concluded that an inverse condemnation remedy would detrimentally restrict local planners in the performance of their duties.

The creativity of planners would in no way be inhibited by the threat of damage awards based on unconstitutional regulation. It is their function to develop workable means for the achievement of legitimate public objectives. The availability of the inverse condemnation remedy helps to define the parameters of responsible action and guards against violating those limitations established by the Federal Constitution.

The availability of the inverse condemnation remedy would benefit the land use planning process. Unlike invalidation, this remedy preserves the integrity of a comprehensive plan in the event a component zoning ordinance is successfully challenged. When an ordinance is invalidated, the continued viability of the entire planning scheme, of which the ordinance was a part, is called into question. By upsetting a zoning ordinance on the basis of its application to one parcel, the comprehensiveness of a regional plan is destroyed. It is contrary to good common sense to invalidate an otherwise valid and beneficial regulation which imposes hardship on only one (or a few) individual(s) when the hardship can be alleviated through the payment of damages. In fact, it has been suggested that "[t]he

criteria for determining whether to allow an award should be whether it would upset an entire regulatory scheme to invalidate the statute." *Comment: An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal for Reform,* 33 Albany L. Rev. 537, 550 (1969).

B. The Perceived Threat of Fiscal Harm Cannot Justify Abrogation of Constitutional Rights

The California court's opinion reflects an overriding concern for the impact on the public fisc and an insensitivity to the impact on the property owner of the court's preferred remedy, invalidation. This attitude underscores an improper approach to adjudication involving the just compensation guarantee. The court may not cause the strength of the Just Compensation Clause of the Federal Constitution to ebb and flow with the changing conditions of government or societal preference. This Court has indicated that the economic impact of regulation on the claimant is of "particular significance" in resolving controversies arising under the Just Compensation Clause. *Penn. Central,* 438 U.S. at 124. The California court ignored this significant factor.

Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner. "If there are such liabilities to government, there must be staggering losses

to private owners."[6] The costs of education, welfare, health services, transportation, and other services heavily burden local governments. Provision of open space and allocation of land use in general should not be treated differently. "Interfering with the individual rights of a few property owners will not solve the financial crises of our state and local governments."[7] In this connection, "it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all."[8] As Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon:*

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.*, 260 U.S. at 416.

CONCLUSION

The decision of the California Supreme Court has placed in jeopardy the fundamental constitutional right of property. This is a right of individual liberty. *Lynch v. Household Finance Corp.*, 405 U.S. at 552. The availability of a remedy in inverse condemnation to challenge regulatory action is essential to the protection of that right and the liberties which flow from the exercise of the right. The right to receive just compensation for private property

[6]Hagman D., Misczynski, D., *Windfalls for Wipeouts: Land Value Capture and Compensations*, 297 (1978).

[7]Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law. 25, 44 (1973).

[8]Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1181 (1967).

taken for a public use, whether it be open space preservation or another purpose, has long been heralded as an essential protection against governmental abuse and discrimination. *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668, 680 (1896). It was in the *Pennsylvania Coal Co.* case that Justice Holmes observed that the Just Compensation Clause protects against the destruction of private property resulting from the unlimited exercise of the police power. Neither the interests in immunizing communities from financial liability nor the circumstances brought upon municipalities by California's tax limitation initiative can warrant abrogation of that constitutional guarantee.

For the foregoing reasons amicus curiae Pacific Legal Foundation respectfully urges that probable jurisdiction be noted.

Respectfully submitted,

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae
Pacific Legal Foundation

ELLEENE A. KIRKLAND
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

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